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In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE BANTA COMPANY, INC., BANTA DIVISION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

GRAPHIC ARTS INTERNATIONAL UNION,
LOCAL NO. 382, AFL-CIO-CLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction to review a decision by the General Counsel of the National Labor Relations Board not to prosecute unfair labor practice charges filed by the petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 626 F.2d 354.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. The petition for a writ of certiorari was filed on October 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d), provides in relevant part:

> The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *

STATEMENT

1. Petitioner filed charges alleging that the respondent Union had violated Section 8(b)(1)(A), (2) and (5) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), (2) and (5). In substance, petitioner alleged that the Union's new, increased initiation fees were discriminatorily motivated insofar as they were intended to retaliate against employees who had re-

signed from the Union and crossed Union picket lines during a strike against petitioner, and that the fees were excessive in light of the fees charged by similarly situated unions in the area.[1] Following an investigation, the Regional Director issued a complaint charging that the new initiation fees were both discriminatory and excessive (A. 7-13).[2]

Before any hearing was held on the complaint, further investigation by the Regional Office disclosed significant weaknesses in the case. Further interviews with the Board's witnesses revealed that their testimony would not support the allegations of discriminatory motivation, and new evidence supplied by the Union showed that the initiation fees had not been intended, when authorized by the membership, to apply to members who had crossed the picket lines during the strike (A. 71-72). In these circumstances, the Regional Office determined that it could not sustain its burden of proof with respect to the discrimination part of the complaint. Accordingly, the Regional Director decided to withdraw the discrimination allegation.

At the same time, the Regional Office and the Union conducted settlement discussions with respect to the amount of the fees. Thereafter, the Regional Director and the Union entered into an informal settlement[3] of

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[1] After the strike was settled, the Union raised its initiation fees from $25-$50 to $350-$450 (Pet. App. 2a).

[2] "A." references are to the joint appendix filed in the court of appeals.

[3] The Board's rules provide for two kinds of settlement agreements: "formal" and "informal." A formal settlement requires the entry of an order by the Board, and a formal settlemal settlement agreement contains the respondent's consent to entry of an enforcement order by the appropriate court of appeals. The terms of formal settlements are subject to review

the charge that the new initiation fees were excessive, in violation of Section 8(b)(5) of the Act, 29 U.S.C. 158(b)(5). The settlement agreement required that the Union not establish any initiation fees exceeding $250, and that it refund with interest any amount already paid in excess of that limit. For his part, the Regional Director agreed to withdraw that part of the complaint charging that the initiation fees were excessive (A. 53).

Petitioner refused to accept the settlement, and it appealed the Regional Director's approval of the agreement to the General Counsel (A. 61, 62–68). The General Counsel concluded that the $250 initiation fee permitted by the settlement was still excessive. Accordingly, the case was remanded for issuance of a new complaint limited to the allegation that the initiation fee charged by the Union was excessive, in violation 8(b)(5) of the Act (A. 69).

The General Counsel also approved the withdrawal of the complaint as to the charge that the new initiation fee was discriminatory because "[t]he evidence was deemed insufficient to establish that the Union violated Section 8(b)(1)(A) and/or (2) of the Act, as alleged" (A. 69). However, the General Counsel subsequently determined that the Regional Office had not formally notified petitioner of the dismissal of the discrimination charge, or the basis for that action, and

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and approval by the Board. Board Statements of Procedure, Series 8, 29 C.F.R. 101.9(b)(1) (Pet. App. 10a–11a). An informal settlement does not require the entry of a Board order or court decree; it provides for discontinuance of the unfair labor practice proceeding in exchange for the respondent's voluntary commitment to take specific remedial action. 29 C.F.R. 101.7, 101.9(b)(2). Informal settlements are not subject to review or approval by the Board except in those cases in which the settlement has been reached after the commencement of a hearing on the unfair labor practice charge. 29 C.F.R. 101.9(b)(2), 101.9(d) (Pet. App. 11a–12a).

that petitioner had not been advised of its right to appeal to the General Counsel from the dismissal of the discrimination charge under the Board's Rules and Regulations, Series 8, 29 C.F.R. 102.19, and Statements of Procedure, Series 8, 29 C.F.R. 101.6.[4] Accordingly, the General Counsel directed the Regional Director to take formal action on the discrimination charge.

Thereafter, petitioner was notified by the Regional Director that the discrimination charge had been dismissed because of insufficient evidence of discriminatory motive, and that a complaint based on such a charge would not be reissued. At the same time, the Regional Director advised petitioner of its right to appeal this decision to the General Counsel (A. 71–72).

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[4]Section 102.19 of the Board's Rules provides, in pertinent part:

> (a) If, after the charge has been filed, the regional director declines to issue a complaint, or having withdrawn a complaint * * * refuses to reissue it, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing an appeal with the general counsel in Washington, D.C. * * *.

Section 101.6 of the Board's Statements of Procedure provides, in pertinent part, with respect to circumstances in which the investigation discloses insufficient evidence to support the charged violations of the Act:

> If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the general counsel in Washington, D.C., within 10 days.

Additionally, Section 102.18 of the Board's Rules, 29 C.F.R. 102.18, provides:

> Any such complaint may be withdrawn before the hearing by the regional director on his own motion.

Petitioner appealed from the Regional Director's decision and the General Counsel denied the appeal on the merits (A. 78).

2. Petitioner sought review in the court of appeals of the General Counsel's decision not to prosecute the discrimination charge. The court dismissed the petition, finding no jurisdiction to review prosecutorial decisions made by the General Counsel pursuant to his exclusive authority under Section 3(d) of the Act, 29 U.S.C. 153(d) (Pet. App. 2a). The court based that holding on the legislative history of Section 3(d), and on the decisions of this Court and the Fourth Circuit holding that the General Counsel's determination whether to issue an unfair labor practice complaint is not reviewable. This principle, the court held, applied to the withdrawal of a previously issued complaint because "the authority vested in General Counsel over the prosecution of complaints 'must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it' " (Pet. App. 5a, quoting *Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d 795, 799 (2d Cir. 1964)). The court rejected petitioner's contention that judicial review was available simply because a complaint had initially been issued on petitioner's charge of discrimination. The court held (Pet. App. 5a):

> [O]ur jurisdiction to review General Counsel's prosecutorial decisions does not depend upon whether or not he has issued a complaint. It is the character of the decision which is critical. Where, as here, the decision is fundamentally prosecutorial—based essentially upon a determination that the available evidence will not support prosecution of the alleged violation—we hold that we lack jurisdiction to review.

The court distinguished the cases upon which petitioner relies, noting that those cases held that the courts of appeals have jurisdiction to review the terms of post-complaint settlement agreements, and did not involve decisions by the General Counsel to terminate a prosecution. The court explained (Pet. App. 5a–6a):

> We note the Company's heavy reliance on *International Ladies Garment Workers Union* v. *NLRB*, 501 F.2d 823 (D.C. Cir. 1974) and *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (3 Cir. 1966) to support a contrary result. But we think that both cases are inapposite. Both involved the withdrawal of charges pursuant to an informal settlement agreement which adjusted conflicting interests and both held that such post-complaint settlements are reviewable. In the instant case, despite the fact that the settlement agreement may be read to include dismissal of the discrimination charge as well as to settle the charge that the initiation fee was excessive, we think that the decision not to proceed with the discrimination charge was based essentially upon the independent conclusion that the available evidence was insufficient to prove the charge. It was not relinquishment of a cause of action having possible merit in an effort to achieve other objectives; it was recognition that a cause of action could not be proved. As such, it was an unreviewable prosecutorial decision.

ARGUMENT

Under Section 10(f) of the Act, 29 U.S.C. 160(f), the courts of appeals may review only "final order[s] of the Board." The "order" which petitioner seeks to have reviewed here, however, is not an order of the Board; it is a decision of the General Counsel to terminate the prosecution of part of a complaint that originated with

petitioner's charges against the Union. That decision is committed by statute to the General Counsel's discretion, and it is not reviewable in either the courts of appeals under Section 10(f) of the Act or in the district courts. As this Court has noted, Section 3(d) of the Act grants to the General Counsel "final authority" over the prosecution of unfair labor practice charges, and his decision whether to prosecute an unfair labor practice charge is not reviewable. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). "Congress has delegated to the Office of General Counsel * * * the unreviewable authority to determine whether a complaint shall be filed." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). Thus "a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration" (*id.* at 139).[5]

Petitioner's contention that the decision below conflicts with *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (3d Cir. 1966), and *International Ladies' Garment Workers Union* v. *NLRB*, 501 F.2d 823 (D.C. Cir. 1974), which hold only that post-complaint informal settlements are subject to judicial review, is based upon the faulty premise (Pet. 7) that the dismissal here was undertaken "pursuant to an informal settlement agreement."[6] The court of appeals rejected that

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[5] And see *Newspaper Guild, Erie Newspaper Guild, Local 187* v. *NLRB*, 489 F.2d 416, 426 (3d Cir. 1973); *Saez* v. *Goslee*, 463 F.2d 214, 214-215 (1st Cir. 1972); *Wellington Mill Division* v. *NLRB*, 330 F.2d 579, 590-591 (4th Cir.), cert. denied, 379 U.S. 882 (1964).

[6] Other cases upon which petitioner relies (Pet. 11) are wholly inapposite because they involve judicial review of formal settlement agreements, which must be approved by Board order. See note 3, *supra*.

contention, however, correctly finding that the refusal to prosecute the discrimination charge was based on the independent conclusion that there was insufficient evidence to support prosecution. That finding is supported by the record (see pages 2–4, *supra*), and, in any event, it involves only an assessment of the particular factual circumstances of this case, which does not warrant review by this Court.[7]

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[7] Contrary to petitioner's contention (Pet. 12–13), the rationale of *Leeds & Northrup Co.* v. *NLRB*, *supra*, and *International Ladies' Garment Workers Union* v. *NLRB*, *supra*, does not extend to the circumstances presented here. Both of those cases involved review of the terms of a settlement agreement, rather than, as here, a determination by the General Counsel that the evidence is insufficient to warrant prosecution. As the District of Columbia Circuit stated, the General Counsel's action in accepting an informal settlement involves "essentially adjudicatory attributes" because it "provides for an adjustment of the conflicting interests of the private parties and thus partially or wholly remedies the underlying labor dispute" and, therefore, "cannot meaningfully be distinguished from other types of Board action traditionally held to be within the review provisions of Section 10(f)." *International Ladies' Garment Workers Union* v. *NLRB*, *supra*, 501 F.2d at 831. By contrast, as the court below found (Pet. App. 5a–6a), the General Counsel's decision that prosecution was unwarranted, because of insufficient evidence to support the claimed discrimination, is a routine exercise of the prosecutorial discretion vested in the General Counsel by Section 3(d) of the Act. See, *e.g.*, *Wellington Mill Division* v. *NLRB*, *supra*, 330 F.2d at 590–591; *Retail Store Employees Union Local 954* v. *Rothman*, 298 F.2d 330, 332 (D.C. Cir. 1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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